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No. 09-1484

In the Supreme Court of the United States

EARL JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was a person responsible for paying over trust fund taxes withheld from the wages of company employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 359 Fed. Appx. 881. The orders and opinion of the district court (Pet. App. 5a-6a, 7a-11a, 12a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2009. A petition for rehearing was denied on March 5, 2010 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on June 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employers are required to withhold Federal Insurance Contribution Act and federal income taxes from

their employees' wages and to remit to the United States the amounts withheld. 26 U.S.C. 3102(a), 3402(a). The withheld taxes constitute a special fund held in trust for the United States. 26 U.S.C. 7501(a); see *Slodov* v. *United States*, 436 U.S. 238, 243 (1978). If an employer withholds trust fund taxes but fails to pay them over to the government, the government may collect the amount of unpaid tax from a "responsible person"—that is, "[a]ny person required to collect, truthfully account for, and pay over any tax"—who "willfully fails" to make the required payments. 26 U.S.C. 6672(a); see *Slodov*, 436 U.S. at 244-246 & n.7. The term "person," for purposes of Section 6672(a), "includes an officer or employee" who "is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. 6671(b).

2. In 1989, petitioner founded Jordan Pharmaceuticals, Inc. (JPI), a pharmaceutical company that produced generic injectable drugs. Pet. App. 2a, 13a, 19a-20a. From 1989 until September 6, 2000, petitioner served as JPI's President, Chief Executive Officer (CEO), Treasurer, and Chairman of the Board of Directors. *Id.* at 13a, 19a. He was also a substantial stockholder. *Id.* at 29a. Under JPI's bylaws, petitioner had "general supervision, direction, and control over the corporation's business and its officers." *Id.* at 23a (internal quotation marks and citation omitted).

In 1998, JPI turned to its longtime attorney, Andrew Pollet, to raise capital to fund the purchase of manufacturing facilities. Pet. App. 20a. Petitioner asserts that Pollet demanded control of the company's finances in return for Pollet's performance of fundraising activities. *Ibid.* In 2000, facing financial difficulty, JPI ceased operation and entered into a merger agreement with another company. *Ibid.*

3. JPI did not pay over to the United States its trust fund taxes for the third and fourth quarters of 1999, or for the third quarter of 2000. Pet. App. 20a. The Internal Revenue Service (IRS) conducted an investigation. *Id.* at 23a. During that investigation, petitioner admitted that, during the relevant periods, he had possessed the power (1) to hire and fire employees; (2) to open and close bank accounts; (3) to authorize payroll checks and prepare federal payroll tax returns; (4) to authorize payment of federal tax deposits; and (5) to perform other company-related duties. *Id.* at 24a.

Pursuant to 26 U.S.C. 6672, the IRS assessed trust fund recovery penalties against petitioner. After making partial payments toward the assessed penalties, petitioner filed an administrative refund claim. See Pet. App. 13a n.1. The IRS denied petitioner's request for refund. See *ibid.*

4. Petitioner filed a refund suit in federal district court, and the United States counterclaimed for the balance of the assessments. Pet. App. 13a n.1. The district court awarded summary judgment in favor of the United States with respect to the third and fourth quarters of 1999. *Id.* at 5a-35a.[1]

The district court concluded that petitioner was liable for the payment of the trust fund taxes under 26 U.S.C. 6672(a) because he was a "responsible person" who had "willfully" failed to pay the taxes. Pet. App. 13a; see *id.* at 21a-31a. The court explained that "whether a person is 'responsible' is a question of 'status, duty, and authority,'" *id.* at 16a (quoting *Davis* v. *United*

[1] Petitioner's liability for trust fund taxes for the third quarter of 2000 was settled by the parties while the case was pending before the district court. Cf. Pet. App. 5a 6a (granting summary judgment order only with respect to the third and fourth quarters of 1999).

States, 961 F.2d 867, 873 (9th Cir. 1992), cert. denied, 506 U.S. 1050 (1993)), and that a person is "responsible" for payment of trust fund taxes if he has "significant control" over "what bills should or should not be paid, and when," *ibid.* (quoting *Purcell* v. *United States*, 1 F.3d 932, 936 (9th Cir. 1993)). Because "*exclusive* control is not required," the court noted, "more than one person within a company may be held to be a 'responsible' person." *Ibid.* (citing *Gephart* v. *United States*, 818 F.2d 469, 476 (6th Cir. 1987)). The court further explained:

> Among the factors that courts have looked to determine whether a person exercises sufficient authority to be 'responsible' are (1) The duties of the officer under the corporate bylaws; (2) The ability of the officer to sign checks of the corporation; (3) The identity of the officers, directors and shareholders of the company; (4) The identity of the person responsible for the hiring and firing of employees; and (5) The identity of the person who controlled the finances of the corporation.

Id. at 23a (citing *Gephart*, *supra*).

Applying that multi-factor analysis to the circumstances of this case, the district court concluded that petitioner was responsible for the payment of trust fund taxes during the relevant time periods. The court explained that petitioner was JPI's President, CEO, Treasurer, and Chairman of the Board of Directors, Pet. App. 23a; that, under the corporate bylaws, he had "general supervision, direction, and control over the corporation's business and its officers," *ibid.* (internal quotation marks and citation omitted); that he was a signatory on two bank accounts at Wells Fargo Bank and had

signed payroll checks and at least one check on the general account after payroll and general accounts were opened at Imperial Bank in November 1999, *id.* at 25a-26a; that he had hired employees, including "individuals responsible for the financial administration of the company," *id.* at 28a; that he was "responsible for large-scale purchases," *ibid.*; and that he was a "substantial stockholder," *id.* at 29a.

The district court rejected petitioner's argument that he could not be a "responsible" person for these purposes because he had yielded control of JPI's finances to Pollet in exchange for Pollet's agreement to raise funds for JPI. Pet. App. 26a-27a, 30a. The court explained that "more than one person may be 'responsible' for purposes of 26 U.S.C. section 6672," and that whatever control Pollett had exercised over the company's finances "d[id] not relieve [petitioner], in his role as President, CEO and Treasurer of the company, from his duty to guarantee that trust fund taxes are paid." *Id.* at 30a. The court also noted that, in addition to his titles, petitioner had "*authorized* Pollet as a signatory" on the company's bank accounts, and had "indisputably exercised other indicia of authority." *Id.* at 26a-27a.

Petitioner did not dispute that his failure to pay trust fund taxes for the third and fourth quarters of 1999 was willful. See Pet. App. 32a-33a (noting that "[o]ther creditors were paid * * * in an apparent attempt to keep JPI running," even though petitioner knew that JPI's trust fund taxes remained unpaid). The district court held petitioner liable in the amount of $404,413.65, plus any additional interest accruing after November 5, 2007. *Id.* at 6a.

5. The court of appeals affirmed. Pet. App. 1a-4a. In an unpublished per curiam opinion, the court con-

cluded that there was "no factual dispute regarding [petitioner's] status as a 'responsible person' under § 6672," despite Pollet's alleged control over the company's finances. *Id.* at 2a-3a. The court explained that petitioner was the "founder, President, Director, CEO, and Treasurer," and that he had "authorized much of Pollet's financial control and, by his own admission, managed the day-to-day operations of business, prepared the payroll tax returns, authorized payments of federal tax deposits, signed financing contracts, and determined the company's financial policy." *Id.* at 2a.

ARGUMENT

Petitioner contends (Pet. 14-37) that the district court erred in concluding that he was a person responsible for withholding, accounting for, and paying over trust fund taxes on behalf of a corporation under 26 U.S.C. 6672. The court of appeals correctly rejected that contention, and its factbound determination does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As the courts below correctly recognized, an officer or employee is a "responsible person" under Section 6672 if the individual's "status, duty, and authority" are such that he has the effective ability to pay the taxes owed. Pet. App. 3a (quoting *Davis* v. *United States*, 961 F.2d 867, 873 (9th Cir. 1992), cert. denied, 506 U.S. 1050 (1993)); see *id.* at 23a; see also *Purcell* v. *United States*, 1 F.3d 932, 937 (9th Cir. 1993) ("[T]he duty to ensure that withheld employment taxes are paid over flows from the authority that enables one to do so."). For purposes of liability under 26 U.S.C. 6672, a person is "responsible" if he has "significant" control over the com-

pany's financial affairs; total or exclusive control is not required. Pet. App. 23a (quoting *Purcell*, 1 F.3d at 937).

The courts below correctly held that petitioner was a "responsible person" under the applicable standard. Petitioner was JPI's founder, President, CEO, Treasurer, and Chairman of the Board of Directors. Pet. App. 23a. Under the corporate bylaws, he had "general supervision, direction, and control" of the company. *Ibid.* (internal quotation marks and citation omitted). Petitioner admitted that he had the "authority to hire and fire employees, to open and close corporate bank accounts, to authorize payroll checks and prepare federal payroll tax returns, to [pay] federal tax deposits, and other duties." *Id.* at 24a. Petitioner had signed checks during the relevant period, *id.* at 26a, and he was a "substantial stockholder" of the company, *id.* at 29a.

The courts below further correctly concluded that any financial authority petitioner may have yielded to Andrew Pollet did not relieve petitioner of his responsibility for JPI's unpaid trust fund taxes. The court of appeals based that holding both on the scope of petitioner's overall authority over the affairs of the corporation and on the fact that petitioner had "authorized much of Pollet's financial control." Pet. App. 2a; see *id.* at 2a-3a; see also *Purcell*, 1 F.3d at 937 (explaining that a responsible person cannot avoid liability by delegating his authority to other persons). That factbound conclusion does not warrant further review.

2. Petitioner contends (Pet. 15-30) that the decision below conflicts with decisions of other courts of appeals and with a prior decision of the Ninth Circuit. That contention lacks merit.

Contrary to petitioner's suggestion (Pet. 15-16), the decision below does not conflict with either *United*

States v. *Carrigan*, 31 F.3d 130 (3d Cir. 1994), or *Lewis* v. *United States*, 336 Fed. Appx. 535 (6th Cir. 2009) (unpublished), cert. denied, 130 S. Ct. 1713 (2010). In each of those cases, the court of appeals determined responsible-person status by applying the same general multi-factor analysis as the courts below. See *Carrigan*, 31 F.3d at 133; *Lewis*, 336 Fed. Appx. at 538-539. To be sure, the courts of appeals in *Lewis* and *Carrigan*, unlike the court below, found that disputed factual issues precluded summary judgment. That difference in outcomes, however, resulted from factual dissimilarities between those cases and this one, rather than from any inconsistency among the courts' legal approaches. See *Carrigan*, 31 F.3d at 134 (corporate president presented evidence that he did not own stock in company, did not sign company's tax returns, did not negotiate with company creditors, lacked independent authority to hire or fire employees, and lacked access to the corporate books, records, and checkbooks); *Lewis*, 336 Fed. Appx. at 538-539 (corporation's CEO presented evidence permitting an inference that the Board of Directors, which had assigned financial duties to the Chief Financial Officer (CFO), "would not have supported [the taxpayer] had he attempted to override [the CFO's] decisions about which creditors to pay," while the CFO presented evidence that the Board of Directors had transferred responsibility for deciding "what was paid and what wasn't paid" to another person).[2]

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[2] Other court of appeals decisions cited in the petition for a writ of certiorari (at 16-17) similarly applied the same general approach as the courts below to factual circumstances that are distinguishable from this case. See *Vinick* v. *United States*, 205 F.3d 1, 11-15 (1st Cir. 2000) (concluding that the district court's findings did not establish that the corporate treasurer was a responsible person where he lacked access to

Petitioner's reliance (Pet. 23-24, 27, 29-30, 35-36) on *Alsheskie* v. *United States*, 31 F.3d 837 (9th Cir. 1994), is likewise misplaced. Even if the courts below had applied a standard different from that applied in *Alsheskie*, an intracircuit conflict would not provide a basis for this Court's review. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, no such conflict exists.

The court in *Alsheskie* explained that, for purposes of liability under 26 U.S.C. 6672, a "responsible party" is a person who has "the authority required to exercise significant control over the corporation's financial affairs." 31 F.3d at 838 (quoting *Purcell*, 1 F.3d at 937). Applying that standard, the Ninth Circuit upheld, as not clearly erroneous, the district court's finding that Alsheskie was not responsible for his company's unpaid trust fund taxes even though he was the titular head of the corporation. The court explained that Alsheskie's control "over what bills to pay or not pay" rested with the corporation's parent pursuant to a financing agreement, and that he was "an employee, not an owner during the critical period." *Id.* at 839. As the Tenth Circuit later noted, "[a]ny lack of control which [the taxpayer in *Alsheskie*] may have had resulted from an arrangement which he did not create." *Bradshaw* v. *United States*, 83

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the company checkbooks during the relevant period, never exercised his hiring authority, and "had little involvement in the daily management of the corporation"); *O'Connor* v. *United States*, 956 F.2d 48, 51-52 (4th Cir. 1992) (concluding that allegations of company vice president, part-owner, and director that he did not perform any duties associated with his titles, but rather acted as "little more than a passive investor," were sufficient to create a factual question about his responsibility for the payment of trust fund taxes).

F.3d 1175, 1181 n.6 (1995), cert. denied, 519 U.S. 928 (1996). In this case, by contrast, the court of appeals explained that petitioner had not simply acted as an employee, and the court viewed the record as establishing that petitioner himself had "authorized much of Pollet's financial control." Pet. App. 2a.

Petitioner disputes that assessment of the evidence, suggesting that Pollet "wrested control of the company's finances from petitioner." Pet. 27; see Pet. 27-29. Petitioner's own recitation of the facts (see Pet. 9, 28-29), however, leaves little doubt about his involvement in creating the financial arrangement with Pollet. In any event, that factbound dispute does not implicate any legal issue of recurring importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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